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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1948

No. 234

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,
Petitioner and Appellant Below,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A Corporation,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

This is an action under the Federal Employers Liability Act commenced by Mrs. Marie Reynolds (here the petitioner) suing as the Administratrix of the Estate of her late

husband, Hury O. Reynolds, Deceased, against the Atlantic Coast Line Railroad Company, to recover damages for his death. It was commenced in the Circuit Court of Jefferson County, Alabama (R. 1). (10th Judicial Circuit of Alabama.)

The complaint, as originally filed and as subsequently amended, consisted of twelve counts. The record was abridged in the Court below and for present purposes, the complaint consists of three counts, designated as Counts 10, 11 and 12 (R. 2-10 inc.). The trial court sustained the defendant's demurrer to the complaint (R. 21) when, conformably to the local practice[1] the plaintiff suffered a nonsuit with appeal to the Supreme Court of Alabama. That Court affirmed the judgment of the trial court in sustaining the demurrers to the complaint.

Reynolds, for whose death the action was commenced, was an employee of the Atlantic Coast Line Railroad Company. He was killed while in that company's service near Lake Harbor, Florida.

In Count 10, after the required averments of interstate commerce, the petitioner alleged that her husband had been killed on November 10, 1945, near Lake Harbor, Florida, while working as a member of the train crew of defendant's freight train Number 567 (R. 4).

The culpability ascribed was that the defendant negligently failed to furnish the deceased with a reasonably safe place to work (R. 4).

The count then went on to elaborate upon that alleged negligence and the manner wherein it caused the death of Mr. Reynolds, as follows: It alleged that the train consisted of an engine, tender, sixteen cars and a caboose; that the ten cars immediately back of the tender were to be cut out of

[1] Section 819 of Title 7 of the 1940 Code of Alabama is as follows: "If, from any ruling or decision of the court on the trial of a cause, either upon pleadings, admission or rejection of evidence, or upon charges to the jury, it may become necessary for the plaintiff to suffer a nonsuit, the facts, point, ruling or decision may be reserved for the decision of the appellate court by bill of exceptions or by appeal on the record as in other cases."

the train at Lake Harbor and left upon a siding there; that in connection with the intended switching movement, the deceased had taken his position at the lead end of the sixth car ahead of the caboose (and just back of the lead ten cars) where the train was then to be uncoupled (R. 5).

The count went on to charge that as said freight train approached the point where the switching movement was to be made and where the ten cars were to be detached from the train, it passed over track rendered dangerous by the close proximity of tall canes negligently permitted to grow and remain there. It said that in the performance of his duties the deceased was required to pass a signal to the engineer to indicate to him when to stop the train at the appropriate point so as to uncouple the first ten cars from the remainder of the train, and place them upon the side track (R. 4).

The count then charged that the signal which the deceased was thus required to pass to the engineer ordinarily would have been made as the deceased was suspended from the right side and lead end of the sixth car ahead of the caboose, but that in this instance he was unable to follow this routine because of the tall canes which, as the train moved forward, might scrape him off the side of the car. The count averred that he was thus required to cross over from the lead end of the sixth car ahead of the caboose—a gondola car—to a tank car ahead where his signals would be visible to the engineer and where the danger from the tall canes would be obviated (R. 4).

The count further charged that while thus crossing from one car to the other, the train being in motion, the deceased was thereby caused to enter a place of much greater danger than that with which he would have been confronted had he been able to signal in the ordinary and usual fashion from the right side of the front end of the gondola car; and that while so acting under these circumstances of enlarged danger, he fell between the cars and was run over and killed (R. 5).

In Count 11 liability is predicated upon an entirely different theory. Here the petitioner ascribed her husband's death to the negligent failure of the railroad to provide an adequate number of competent fellow servants to work with him in the performance of their duties on the occasion of his death (R. 5).

The count charged that the railroad, as a co-worker for the deceased, furnished a brakeman named Skelly, who was so incompetent and unskilled that he could not perform his appointed duties as brakeman to signal the engineer when to stop the train preliminary to the intended switching movement, and that Mr. Reynolds was thus required to take over Skelly's job (thereby quitting a safer place of work and the performance of safer labors, in turn undertaken by the conductor); and while thus performing the appointed duties of Skelly, who at that time was standing idle and doing no work whatsoever, Mr. Reynolds fell between two cars of the moving train and was run over and killed (R. 6).

The theory of liability asserted in Count 12 is in substance a combination of Counts 10 and 11, spelled out with somewhat greater particularity.

Count 12 seeks a recovery for the negligent failure to furnish the deceased with a reasonably safe place to work coupled with the negligent failure to provide an adequate number of competent fellow servants to work with him. (R. 7).

The count alleged that the railroad provided one, Skelly, as one of the two brakemen on the train (R. 8). It charged that Skelly was incompetent and unfit properly to perform and discharge the duties of footboard brakeman then assigned to him. These duties, the count alleged, had to be taken over by the deceased, who ordinarily would have performed them by signalling from the right side and front end of the sixth gondola car ahead of the caboose, but that because of the danger from the canes and while in the performance of Skelly's appointed duties, he had to cross

over from the gondola to a tank car immediately ahead of it, during which he fell between the two and was run over and killed.

The count concludes that being thus relieved of his own relatively safer work as head brakeman and directed to perform the more hazardous duties of footboard brakeman (made more dangerous by reason of the tall canes growing so close to the right of way), Reynolds was killed (R. 9).

The Court below affirmed the judgment of the trial court sustaining the demurrer to the petitioner's complaint in that neither of said three counts stated a cause of action, in that no proximate causation existed.

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because:

(a) It has decided a federal question in a way probably in conflict with the applicable decisions of this Court. *Lillie v. Thompson* MS., 92 L.ed. 115; *Ellis v. Union Pacific R. R. Co.*, 329 U. S. 649, 67 S. Ct. 598, 91 L.ed. 572; *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L.ed. 916; *Bailey v. Central Vermont Ry Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L.ed. 1444; *Tiller v. Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L.ed. 610.

The statutory authority under which such jurisdiction is invoked is 28 U. S. C. Section 347 (Judicial Code, Section 240, as amended).

The date of the judgment to be reviewed is June 26, 1948 (R. 29).

Question Presented

The sole question here presented is as follows: Could it be found from the facts alleged in either of the three counts of the complaint that the death of the plaintiff's intestate, at least in part, resulted from the respondent's negligence?

Reasons Relied on For Allowance of Writ

The Court below has decided a federal question in a way in conflict with decisions of this Court. Cases cited *ante* under "Jurisdictional Statement." The Court below judicially determined as a matter of law that the death of petitioner's intestate could not have been proximately caused, in part at least, by the actionable negligence of the respondent. Under the foregoing authorities—decisions of this Court—that determination was for the jury alone, and in usurping it the Court below transcended its function and its competence.

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this Court to the Supreme Court of Alabama, commanding said Court to certify and send to this Court the full and complete transcript of the record and of the proceedings of the said Supreme Court had in the case numbered and entitled on its docket No. 643, *Marie Reynolds, Admrx. v. Atlantic Coast Line Railroad Co.*, to the end that this case may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Supreme Court of Alabama be reversed by this Court; and for such further relief as to this Court may seem proper.

MRS. MARIE REYNOLDS, *as Administratrix of the Estate of Hury O. Reynolds, Deceased,*

Petitioner.

By J. KIRKMAN JACKSON,
818 Massey Building,
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Her Attorney.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1948.

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MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,
Petitioner and Appellant Below,

vs.

ATLANTIC COAST LINE RAIROAD COMPANY,
A Corporation,
Respondent and Appellee Below

BRIEF IN SUPPORT OF THE PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

OPINIONS OF COURTS BELOW

The opinion of the Supreme Court of Alabama (R. 22) is reported in _____ Ala. _____, _____ So. (2) _____; the trial court rendered its judgment sustaining the demurrer without opinion (R. 21).

JURISDICTION

This has already been set forth in the preceding Petition, and is here adopted and made a part of this case.

STATEMENT OF THE CASE

Under "Summary Statement of the Matter Involved" (petition ante) a sufficient statement is made fully to understand this case, and it is here adopted by reference.

THE SPECIFICATION OF ERRORS

The Court below erred in holding that from the facts alleged in the complaint (either in Count 10 or 11 or 12 thereof) the death of the plaintiff's intestate could not have resulted, at least in part, from the negligence of the respondent.

THE ARGUMENT

SUMMARY OF THE ARGUMENT

(a) An interstate railroad must use due care to furnish its employees a reasonably safe place to work and supply an adequate number of competent fellow servants to perform the appointed tasks, and if it fails therein and such failure "*in whole or in part*" causes injury, liability is established.

(b) To deprive railroad workers of the benefit of a jury trial even in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

(c) A railroad is bound to exercise reasonable care to prevent obstructions near its tracks which would be a source of danger to its servants.

(d) The negligence of the railroad may be determined by viewing its conduct as a whole, for "the total may be greater than the sum of its parts."

(e) Under the Federal Act what is the proximate cause of an injury is ordinarily for the jury, to be determined as a fact in view of all the circumstances attending it.

ARGUMENT

In these cases there are certain fundamental propositions so well established and accepted as to require neither the elaboration of argument nor the citation of authority. One of them is that the negligent failure of a railroad to furnish its employee with a reasonably safe place to work is actionable. Upon this theory we sought to frame Count 10 of the complaint.

In Count 10 of the complaint we charged that the defendant was liable because it negligently failed to furnish the plaintiff's intestate a reasonably safe place to work, thereby compelling him to adopt a perilous alternative in pursuing which he was fatally injured.

Equally well established is another theory of liability. It rests upon the negligent failure to provide an adequate number of competent fellow-servants properly to do the required work. It is made the basis of liability charged in Count 11.

Bearing in mind these two fundamental propositions (which we shall assume require no further comment), let us turn to the language of the Act itself, whereby the liability in these cases was ordained and established. (45 U. S. C. A. Sec. 51-56, incl.).

By the Act common carriers by railroad engaged in interstate commerce are made liable for injury or death resulting "in whole or in part" from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or deficiency in its cars, engines, etc.

We repeat that the Act creates a liability for injury or death resulting *in whole or in part* from such designated causes. So, the authoritative Federal pronouncements have literally construed it.

As recently as last February in *Ellis v. Union Pacific R. R. Co.*, 329 U. S. 649, after referring to negligence as being the basis of liability under the Act, the Court declared:

> "... and that negligence must be *'in whole or in part'* the cause of the injury." [Emphasis supplied.]

To disregard the phrase "in part"

"would be emptying the statute of its meaning ..." per Holmes J. in *Union Pacific R. R. Co. v. Hadley*, 246 U. S. 330, 62 L.ed. 751, 38 S. Ct. 318.

What was the effect of the judgment of the Court below

in sustaining the demurrer to the complaint? Simply stated, the effect was to deprive the plaintiff of a jury trial.[2]

That, we submit, was error. Even in close or doubtful cases it would have been improper, for it would take away a goodly portion of the relief which Congress, in the Federal Employers' Liability Act, has ordained must be given to railroad employees and their families.

In *Bailey v. Central Vermont R. R. Co.*, 319 U. S. 350, 87 L.ed. 1444, 63 S. Ct. 1062, Mr. Justice Douglas said:

> "To deprive these workers (i.e., railroad workers) of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The foregoing statement of Mr. Justice Douglas was approved and quoted verbatim in *Blair v. Baltimore & Ohio R. R. Co.*, 323 U. S. 600, 89 L. ed. 490, 65 S. Ct. 545, a later decision written by Mr. Justice Black.

Depriving the plaintiff of the opportunity of having her case heard and determined by a jury was a grave infringement of her rights established by the Act.

There is another legal principle also applicable to these

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[2] Of course the plaintiff's complaint could have been framed in such general terms as to have been good against any demurrer. General allegations of negligence are permissible in Alabama. It is not necessary to allege the *quo modo*. But a verdict rendered on such a complaint would, we apprehend, have certainly been set aside, if we attribute any degree of consistency to the Supreme Court of Alabama. Suppose, however, we had followed this course, alleging negligence generally and not attempting to set forth the *quo modo*, and the jury rendered a verdict for the plaintiff. If the petitioner escaped having her judgment set aside on the railroad's motion for a new trial, the State Supreme Court would have reversed it for the asserted error of not directing a verdict for the defendant. Under Alabama practice, however (as distinguished from some of her sister states) such a judgment of reversal, though fatal, would not be a *final judgment* subject to review here. We would have been required to go back to the Trial Court, go through an empty trial, permit the trial judge to direct a verdict for the railroad, perfect an appeal to the State Supreme Court, allow the case there to be affirmed, and then petition this Court. Only then, if this alternative had been pursued, would review in this Court have been possible. Compare *Davis v. Alabama Great Southern R. R. Co.*, 246 Ala. 64 (Cert. den. 324 U. S. 846).

Therefore we elected not to follow this course but to frame a complaint which would set forth in detail what could be proved by the plaintiff's evidence. Thus we are able to seek a review here, without all the interminable backing and filling which we have described.

cases (as distinguished from the ordinary run-of-mine damage suit). Baldly stated and involving an apparent paradox, it is that "the total of the negligence in a case under the Federal Employers Liability Act may be greater than the sum of its parts." Stated in other language, it is that the negligence of the employer may be determined by viewing its conduct as a whole, especially where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern and where each imparts character to the others. Upon the foundation of this principle we sought to frame Count 12 of the plaintiff's complaint.

So far as we have been able to ascertain, this rule was first enunciated by Mr. Justice Holmes in *Union Pacific R. R. Co. v. Hadley*, 246 U. S. 330, 62. L.ed. 751, 38 S. Ct. 318. Many different circumstances entered into the question of the negligence *vel non* of the defendant railroad. Of them the Court declared:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. *But the whole may be greater than the sum of its parts*, and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct, viewed as a whole, warranted a finding of neglect. Upon that point there can be no question. We are not left to the mere happening of the accident. There were block signals working on the road that gave automatic warning of danger to 501, and which it was negligent to pass, seen or unseen, as the engine crew knew where they were and that another train was not far ahead. There was a snowstorm raging which the jury might have found to have been of unprecedented violence, and it was open to them to find, in view of circumstances unnecessary to detail, that the despatcher ought not to have sent out extra 510 West, as he did, and that he was grossly wrong in

> not allowing 504 to come in, and in not leaving it to 501 to bring back the disabled engine. It might have been found improper to leave the conductor of 501 at Potter. It is superfluous to say more upon this point." [Emphasis supplied.]

* * * *

As we understand the judgment of the Court below it is premised on a supposed absence of proximate causation between the injury suffered and the negligence charged.

The recent decisions of this Court lay down the rule that where negligence is proven in cases under the Federal Employers Liability Act, the question of whether it proximately causes the injury suffered is for the resolution of the jury alone.

Applying that principle to the case at bar if the complaint or any count thereof sufficiently charged negligence (and we must accept the allegations of the three counts as true in the present posture of this case) whether there was a required causal connection of the injury must be for the jury, and the trial court transcended its function (as did the State Supreme Court) in determining as a matter of law that no such proximate causation could exist.

Since the trial of this case in the *nisi prius* Court, this Court has put out *Lillie v. Thompson*, MS. Advance Sheets No. 3, Vol. 92, L.ed. 115. That case, as did this one, went off on the pleadings. The District Court sustained the defendant's motion to dismiss the suit because the complaint failed to state a cause of action. The Circuit Court of Appeals for the Sixth Circuit affirmed that judgment. This Court granted certiorari and in a per curiam decision stated the sole question

> "could it be found from the facts alleged in the complaint, as supplemented by any unconverted allegations by the respondent, that petitioner's injuries resulted at least in part from the respondent's negligence?".

In the *Lillie* case, as in the case at bar, the preoccupation of the District Court and the Court of Appeals was with the question of proximate causation between the injury alleged and the negligence charged.

The Court will remember the facts in that case. The petitioner, a young woman, worked alone during the nighttime in a one-story frame building situated in an isolated part of the railroad yards of the defendant in Memphis. The complaint charged that the railroad had reason to know that the yards were frequented by footpads and that it nevertheless failed to use due precaution to protect the peitioner.

Late one night, while at work, a stranger assaulted her. It was conceded that he was not an employee of the respondent and that the attack was criminal. This Court nevertheless concluded that the allegations of the complaint, if supported by evidence, warranted the submission of the case to the jury. This Court said that the danger was foreseeable and that therefore it could not be said that as a matter of law the pettitioner's injury did not result, *at least in part*, from the negligence of the respondent.

In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 329, this Court declared that the jury draws the ultimate conclusion as to the facts, and

> "That conclusion, *whether it relates to negligence, causation or any other factual matter*, cannot be ignored." [Emphasis supplied.]

In *Bailey v. Central Vermont R. R. Co.*, 319 U. S. 350, Mr. Justice Douglas said:

> "Reasonable care *and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries.*" [Emphasis supplied.]

There are many other decisions of this and other federal courts to the same effect.

We will not pause further to quote from or analyze any of them except *O'Connor v. Chicago M. & St. P. R. R. Co.*, 158 N. W. 343, 163 Wisc. 653, here affirmed in 248 U. S. 536, 63 L.ed. 408, 39 S. Ct. 21. We refer to it because it deals not only with proximate causation, but also involves an obstruction near the tracks of the railroad.

In the *O'Connor* case suit was brought for the death of a trainman killed in a derailment. The complainant alleged that the railroad had negligently allowed a tree to remain so near the right of way that it was liable to be blown down by storms such as were likely to occur. It was blown down, not by an ordinary storm, but one of very unusual severity. It was judicially determined that proximate causation existed.

In Count 10 of the petitioner's complaint we urged that the railroad was liable because it negligently failed to furnish the deceased with a reasonably safe place to work, thereby compelling him to adopt a more perilous alternative in the pursuit of which he met his death.

In negligently failing to remove the tall canes and so furnish him with a safe place to work and do the job he was supposed to do, viz., signal the engineer while suspended from the side of the gondola and thus stop it at the proper place, it was certainly foreseeable that Reynolds would do what he actually did, namely, undertake, while the train was in motion, to move from the front end of the gondola car to the car ahead—a tank car—where, as alleged in the complaint, he could give signals visible to the engineer, and at the same time avoid being scraped off the side of the car by the tall canes.

We are arguing for no novel variation of the principle

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[3]Cf. *Washington R. Co. v. Scala*, 244 U. S. 630, 61 L.ed. 1360, 37 S. Ct. 654 (Allowing a telegraph pole to remain too close to track, causing death of plaintiff's intestate).

of proximate causation either in Count 10 or in any other count of the complaint.

The principle upon which we rely was enunciated by Lord Ellenborough, C. J. in *Jones v. Boyce*, 1 Stark 493, 171 Reprint 540, a hundred years ago. He said:

> "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

It was a customary part of Reynolds' job, as counsel will no doubt argue, at times to pass from car to car, crawling over the top of one to the top of another, or from the end sill of one to the top of another, making his way as best he could all the while the train being in motion. So it was, as we freely concede. But that does not minimize the validity of the further observation that in performing that phase of his work he was not as safe from injury as when suspended from the side of a slowly moving gondola car. In the latter position, if he slipped and fell (taking into account the car's overhang outside the rail), it would have been an unusual accident indeed if he were run over by the wheels. At worst he could have anticipated a scarred and bruised body; but if he slipped and fell to the ground while crossing from one car to another, as here alleged, it was inevitable that he fall to his death.

That, simply stated, was the difference in the two alternatives.

One of them could have been safely pursued, absent the tall canes. Being there, they left him only a Hobson's choice of the dangerous alternative. He made that choice and paid with his life.

Not only was it foreseeable that being unable to signal the engineer from the side of the gondola car he would attempt to crawl to the side of the car ahead—we repeat not only was that foreseeable—but as we view it, it was inevitable. But whether inevitable or merely foreseeable, it

means proximate causation. The court of first instance erred in sustaining the demurrer as did the Court below in affirming that judgment.

The same argument as to the proximate cause is applicable to Count II of the petitioner's complaint.

If we assume that Skelly, whose job Reynolds was attempting to perform when killed, was so incompetent that he could not do it, certainly it was foreseeable, if it were not inevitable, that the job would be delegated to someone else. Reynolds, the other brakeman got that job—a dangerous chore indeed as it so tragically proved.

How then can it be denied that the act of the railroad, in putting Skelly in this train crew, did not *in part at least* cause the death of the petitioner's husband.

It is respectfully submitted that the *Lillie*, the *Tennant*, and the *Bailey cases* are conclusive of the question and it is thus unnecessary to pursue the sometimes fine-spun rationale of proximate causation.

THE CONCLUSION

The three counts of the petitioner's complaint here under consideration, may perhaps be justifiably criticized for being somewhat prolix. If so, we say by way of extenuation that this infirmity is attributable to our purpose to set forth, if possible, by way of allegation, the ingredients of a complaint *in the light of what could be proven by the available evidence in the case*. Thus, as pointed out in the footnote above (Footnote 2), it could be judicially determined without an interminable process, wasteful alike to the Court and the parties, whether the petitioner has or has not a meritorious cause against this railroad for the death of her husband.

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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Appendix

In *L. & N. R. R. Co. v. Maddox*, 236 Ala. 594, 183 So. 849, (1938)—an ordinary damage suit—the Court below was apparently willing to extend proximate causation considerably further than would here be required. While that decision is of no controlling moment here, it may be of some academic interest.

The plaintiff's intestate bought an excursion ticket for a trip over the defendant's railroad from Birmingham to Mobile. About the same time her excursion train was scheduled to depart, another train of the defendant—the Pan American—also going to Mobile, left Birmingham.

By mistake she was permitted to board it. En route to Montgomery, an intermediate point, that mistake was discovered and the plaintiff's intestate was required to leave the Pan American at Montgomery and there await the excursion train. Upon its arrival in Montgomery, in going from the waiting room in the station, the plaintiff's intestate fell down three steps and was injured and died. There was nothing whatever wrong with the steps—either in their structure or because of some foreign substance being upon them.

The Supreme Court of Alabama concluded there was proximate causation between the negligence of allowing the plaintiff's intestate to board the wrong train in Birmingham and the injury which she sustained in falling down the steps in the railroad station in Montgomery. It viewed the death of the plaintiff's intestate as the foreseeable consequence of the initial negligence in Birmingham. It said:

> "[10] It is reasonably to be inferred that in the case at bar Mrs. Montgomery would not have been in appellant's waiting room at Montgomery to again board a train to Mobile if she had not been placed upon or permitted to board this section of defendant's train in question at Birmingham by the mistake of appellant's

agent within the line and scope of his duty. That is to say, the act of appellant's agent in misreading the ticket in Birmingham and permitting her to board the wrong section is so closely related in cause and effect to the fall and injury of decedent, while she was being required to make the change of trains in Montgomery, as to be in law the proximate cause thereof."

The *Maddox* case, if it please the Court, was an ordinary damage suit. It was decided without any statutory aid such as F. E. L. A. Nevertheless proximate causation was held to exist.

It would seem to us that the case at bar is much clearer. There the initial negligence of the defendant caused the deceased to pursue an alternative course of conduct but that alternative was not inherently perilous. Remaining briefly in the station waiting room in Montgomery and then leaving it to board another train was certainly not an implicitly dangerous activity even for an elderly woman.

The reach of the *Maddox* case is certainly broader than the case at bar where the alternative course to which the deceased trainman was driven was inherently dangerous.

Petitioner's Reply Brief to Supplemental Brief & Argum't of Respondent

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

NO. 234

234

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,

Petitioner and Appellant Below,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation,

Respondent and Appellee Below.

PETITIONER'S REPLY BRIEF TO SUPPLEMENTAL BRIEF AND ARGUMENT OF RESPONDENT

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SUPREME COURT OF THE UNITED STATES

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NO. 234

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,
Petitioner and Appellant Below,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation,
Respondent and Appellee Below.

PETITIONER'S REPLY BRIEF TO SUPPLEMENTAL BRIEF AND ARGUMENT OF RESPONDENT

FOREWORD

In a supplemental brief, of which, on New Year's Eve, we were served with an incomplete, typewritten copy, counsel for the respondent undertakes to inject a theory heretofore novel in this case as a reason for affirming the judgment of the court below. We ask permission of the court to file a reply in this form with the understanding that we will replace it with printed copies as soon as possible.

PETITIONER'S REPLY BRIEF TO SUPPLEMENTAL BRIEF AND ARGUMENT OF RESPONDENT

In its supplemental brief the respondent urges that the judgment of the court below should be affirmed because it decides a procedural question (i.e., the sufficiency of

the counts in the declaration—pleading) and is therefore governed by Alabama law and not by the federal decisions; or in the alternative it is said that the decision is partly of adjective (and local) and partly of substantive law and therefore not here reviewable. (*Herb v. Pitcairn*, 324 U. S. 117).

That is simply not so.

The opinion of the Supreme Court of Alabama clearly demonstrates the contrary. The original brief of the respondent disclaims any such suggestion.

The decision of this case was based on a supposed absence of proximate causation between the negligence charged and the death of the plaintiff's intestate. An examination of the opinion below incontestably shows this to be true.

As we have said, there were three counts in the plaintiff's declaration (Counts 10, 11 and 12).

As to Count 10, the Supreme Court of Alabama, in adjudging it to fail to state a cause of action, and thus sanction a jury verdict, declared (R. 26):

> "As we have poinied out *causal connection between the negligence complained of and the injury sustained cannot be left to mere speculation and conjecture.* Nowhere in Count 10 is it made to appear what caused Reynolds to fall between the cars. Climbing on, going from one car to another on a moving freight train in the performance of their duties, is not unusual for trainmen such as Reynolds was. And although dangerous the carrier cannot be charged with or made liable for those injuries which result from the usual risks incidental to employment which cannot be eliminated by the carrier's exercise of reasonable care." (Emphasis supplied.)

So much for Count 10.

As for Count 11, the opinion below (R. 27) observed:

> "Count 11 is subject to the same criticism as is Count 10. *The casual connection between the negligence com-*

plained of and the injuries sustained is not made to appear but is left to speculation and conjecture only." (Emphasis supplied.)

So much for Count 11.

As to Count 12, the Supreme Court of Alabama, in its opinion (R. 27-28) said:

"Count 12 is but a combination of Counts 10 and 11 * * * *The defect in each count of the complaint is not its failure to allege negligence but failure to allege facts showing a casual connection between the negligence and the death of Reynolds.* Count 12 is as defective in this regard as are Counts 10 and 11." (Emphasis supplied.)

Proximate cause, vel non, is the nub of this lawsuit.

That this supposed infirmity represents the true rationale of the decision of the court below (thus making the case here reviewable), and that the court below was not, in truth, concerned with a decision of any procedural matter governed by local law, is further made apparent in the original brief of counsel for the respondent. On page 8 of that brief, counsel states:

"In order to recover in this case it is necessary that petitioner allege and prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident."

And again (Op. Brief, page 8):

"It is elemental in the essential matter of causation, the alleged negligence of the carrier must be a link in an unbroken chain of reasonably foreseen events."

And in summary, counsel for the respondent thus fairly states his real contentions (Op. Brief, page 6):

"The Respondent's demurrers (R. 10 to 20, inc.) challenge the sufficiency of the essential averments of each of the Counts to show the existence of negligence on the part of Respondent or the actual breach of any legal duty owed the deceased (Grounds 1 to 3, 10, 12 to

14, 19, 21, 22, 32, 34, 35, 36, 38 to 41, 44, 46 to 55, 57 to 77, 79 to 81," and also as failing to show any such negligence as the proximate cause, in whole or in part, of the death of the deceased. (Grounds 4, 5; 7, 14, 23 to 30, 32 to 35, 38 to 42, 44, 45, 55, 56, 62 to 65, 68, 69.)"

Thus counsel states the three problems sincerely raised by the demurrer:

(1) Absence of essential averments to show negligence,
(2) No breach of legal duty,
(3) Lack of proximate cause.

The court below (as did the trial court) overruled counsel in his first two contentions, and sustained him in his third. The court said (and we repeat):

> "The defect in each count is not its failure to allege negligence but failure to allege facts showing a causal connection, etc." (R. 27-28.)

What we are trying to say is that the crux of this case is the solution of the sole question of whether, from the facts alleged, (on demurrer conceded to be true) there was a causal connection between the negligence charged and Reynolds' death.

That was the question in the trial court.

That was the question in the Supreme Court of Alabama.

And that was the question presented here and in the original brief submitted by counsel for the respondent.

The notion that the case went off on a procedural question or that such is here involved is, as we submit, entirely by way of afterthought.

* * *

But meeting that contention head-on, our answer is that we are not here concerned with any question of procedure at all. We have here a question of the very essence of the substantive law of the case.

As counsel observes, we attempted to aver in detail all of the facts that the available evidence could show. So we said in the footnote on page 14 of our original brief for the reasons there set forth.

Such was our privilege.

These statements in detail in the three counts of our complaint, in the present posture of this law suit, constitute the facts upon which the decision here should rest.

The trial court held these facts were not enough and sustained the respondent's demurrer to their legal sufficiency. The Supreme Court of Alabama said the trial court was right because there was no proximate causation. Thereby these two courts undertook to decide and there was decided, not a procedural question at all, but on the contrary, one of substance and therefore governed by the decisions of this Court. This is true for the reason that in sustaining the demurrer to the three counts of the complaint the courts *undertook to evaluate the quantum of the petitioner's evidence* which, as this Court has many times declared, is entirely and solely a federal question.

We will pause to refer only to one decision of the many of this court on that point:

Garrett v. Moore-McCormick, Inc., 317 U. S. 239, 63 S. Ct. 246.

In that case Garrett, a seaman for the shipping company, brought suit under the Jones Act, claiming he was hurt by a hatch cover which allegedly fell on him because of the respondent's negligence. Among other defenses the respondent pleaded a release. The Supreme Court of Pennsylvania, affirming a judgment for the defendant, while conceding that it was obligated to apply the federal law creating the right of action in the same sense that it would have been applied in the federal courts, decided that the burden of proof, as to the validity, vel non, of the release did not affect the substantive rights of parties, but was

merely procedural and therefore controlled by the state law. This Court disagreed and reversed that judgment, saying:

> "This court has specifically held that the Jones Act is to have a uniform application throughout the country unaffected by 'local views of common law rules' * * *. *This uniformity requirement extends to the type of proof necessary for judgment.*" (Emphasis supplied.)

Simply put, there is here a statement of facts upon which the plaintiff relies to recover, tendered by her declaration in the trial court and by the demurrer of the respondent admitted to be true. Does that statement include a case sufficient to submit to a jury?

That question must be answered by applying the yardstick of this Court's decisions. It is not to be decided by the application of any "local views of common law rules." Nor is it meet that counsel, in their efforts to force the application of local rules, should indulge in an exercise in semantics, however ingenious, of attempting to ascribe procedural aspects to fundamental, legal questions of substance.

* * *

ON THE PROBLEM OF PROXIMATE CAUSATION

Since we filed our original brief in support of the petition for the writ in this case, we have learned of

Keys v. Pennsylvania R. Co., 104 F. (2) 663, (C. C. A. 2),

We deem that case of sufficient importance to justify its extended discussion, both in the Court of Appeals and here.

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[1] This rule is apparently well understood by the Court below. Compare *Zavatz v. Southern Railway Co.*, 248 Ala. 137, 26 So. (2) 545, and *L. & C. R. Co. v. Johnston*, 205 Ala. 1, 87 So. 866. Probably the Court below, cognizant of the rule as these two cases would indicate, erred in the case at bar because failing properly to conceive the effect of the several recent decisions of this Court, referred to in our original brief.

The plaintiff, as administratrix of the estate of one Keys, a section foreman in the employ of the defendant railroad, recovered judgment in the District Court for his death occurring while he was attempting to put out a brush fire near a shelter station called Bluemont, Maryland, on defendant's main line from York, Pennsylvania, to Baltimore, Maryland. The jury returned a verdict for the plaintiff on which judgment was rendered. The plaintiff's evidence indicated that a brush fire had been negligently started by sparks from one of the defendant's trains and the deceased, in attempting to extinguish it, had died from suffocation due to the smoke and fumes. The railroad contended that the deceased died from cerebral hemorrhage and more importantly that in attempting to put out the fire the plaintiff was merely doing his customary and usual work and that this particular brush fire was no more dangerous than such fires usually are. The Circuit Court of Appeals put aside the question of negligence and rested its decision on the ground that

> "There could be no recovery because that inherent danger in work the deceased had undertaken to perform was not enhanced by any negligence of the defendant after the fire had started."

For which reason the judgment of the District Court was reversed.

The Circuit Court of Appeals further observed:

> "His voluntary exposure of himself to such dangers as did confront him at the time he died involved only the risk of known dangers which were ordinarily incident to his employment."

This Court granted certiorari (308 U. S. 103), and in a *per curiam* decision (308 U. S. 385) reversed the judgment of the Circuit Court of Appeals and affirmed that of the District Court upon the ground

"that the question of assumption of risk was properly submitted to the jury."

We are persuaded that the Keys case is, on principle, completely analogous to the case at bar. In that case (according to plaintiff's evidence), a brush fire was negligently started by an engine of the defendant. This caused the deceased section-hand to act and take steps to put it out. In doing so, he undertook a chore of everyday occurrence in his regular job.

In the case at bar, as alleged in Count 10 of the complaint, Reynolds attempted to cross from the lead end of the gondola to the rear end of the tank car. Crossing from one car to another, the train being in motion, was part of his job. As the Court below says while this was dangerous, it was what he was hired to do (R. 26), for which reason it argues there was no proximate causation.

We respectfully submit that the Keys case is a direct authority to the contrary. It is doubly an authority since the 1939 amendment to the Federal Employers Liability Act with its abolition of the defense of assumption of risk.

There is another decision which we would like to call to the attention of the Court. It is

Penn v. Chicago & N. W. R. R. Co., 163 F. (2) 995 (C. C. A. 7).

In the Penn case, the Court of Appeals reversed a judgment for the plaintiff obtained in the District Court under the Safety Appliance Act. The plaintiff's complaint charged that the defendant negligently equipped a railroad car with a defective coupling which would not uncouple with a pin lifter, contrary to the provisions of the Act.

Penn, the plaintiff, was engaged in classifying cars. He had to run alongside a train moving six or eight miles an hour for fifteen or twenty feet whenever it was necessary to uncouple. He attempted first to uncouple the particular

car while hanging on the side of the next car (thus saving some steps) and working the uncoupling lever from that position. He failed. He then dismounted; running alongside the moving train for two or three steps and working the lever. This time he succeeded, but at that instant, his foot caught in a space between the switch rod and the switch ties at a switch stand and he was hurt. In a decision rendered by this Court on October 25, 1948, the judgment of the Circuit Court of Appeals was reversed (93 L. ed. 37).

While the opinion of the Court of Appeals does not say so, it occurs to us that here most importantly was involved a question of proximate causation. Conceding (which was denied) that there was some defect in the coupling apparatus, the plaintiff was not required to go between the cars. All he did was run alongside the slowly moving train where he succeeded in uncoupling the car. That was the job he was appointed to perform. He stepped in a space between the switch rod and the switch ties. As we view it, the question of proximate causation there was no more difficult than in the case at bar.

And finally on this proposition of proximate causation, we would like to call to the attention of the Court the observations in the "Restatement" (Volume 2, Section 303) which we herewith quote:

> "An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, a third person or an animal in such a manner as to create an unreasonable risk of harm to the other.
>
> "When actor does not intend to cause particular conduct. The actor may not intend the third person to act in any particular way. If so, the actor's negligence lies in the fact that he does or should realize that his conduct may cause the third person so to act, or in the further likelihood that the third person may do the act in a careless manner. In such case, the actor's negligence depends upon the extent to which he is required to realize and take into account the tendency of mankind or of the

particular person to act improperly (see § 302). Where, as in the situations dealt with in this Section, the third person's act is done in response to the stimulus of the situation created by the defendant's conduct, there is a tendency to require the actor to realize the tendency of human beings to act improperly to a greater extent than where he creates a situation, the danger of which lies in the chance of impropriety on the part of a third person in doing an act which is not so influenced by the situation created by the actor."

THE ECHENRODE CASE

This Court on November 15, 1949, put out *Echenrode v. Penna. R. R. Co.* (December 1st issue, Supreme Court Reporter Advance Sheets). Because counsel for the respondent apparently derived considerable satisfaction from it we will make certain observations concerning it.

There are several important aspects of the *Echenrode* decision sharply distinguishing it from the case at bar. Some of them are referred to in the decision of Judge Goodrich, author of opinion in the Court of Appeals. In the first place, Echenrode left a place of safety in the caboose. He had no duties to perform. There was, as the majority of the court viewed it, no obligation on the part of any member of the train crew to look out for him. There was nothing in the deceased's conduct to give the engineer any notice that there was danger involved in the situation. As Judge Goodrich observed (p. 1,000) the sole point upon which he decided was a complete *absence of any negligence whatsoever on the part of the railroad train crew or any member thereof.*

In the case at bar, on the other hand, Reynolds was in the performance of his duties. He had to go where he did go in order to carry out and perform his job. There was negligence both admitted by the demurrer and conceded in the opinion of the Court below. There was negligence under either theory and under either count. The question

here is whether that negligence caused him to be fatally injured.

It is respectfully submitted that the law of the Echenrode decision does not reach the problem.

Respectfully submitted,

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